

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CARL A. PETERS

Claimant

VS.

U.S.D. 315

Respondent

AND

ALLIED MUTUAL INSURANCE CO.

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 194,449

ORDER

On October 24, 1996, the application of the Kansas Workers Compensation Fund for review by the Workers Compensation Appeals Board of an Award by Administrative Law Judge Jon L. Frobish entered on May 14, 1996, came on for oral argument.

APPEARANCES

Claimant appeared not, having resolved his dispute with respondent by settlement hearing on October 4, 1994. Respondent and its insurance carrier appeared by their attorney, Jerry M. Ward of Great Bend, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, William W. Jeter of Hays, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award by the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

What, if any, is the liability of the Kansas Workers Compensation Fund in this matter?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant suffered accidental injury to his back on January 31, 1994, while working for respondent. This was not claimant's first injury to his back. In fact, claimant had prior back surgeries in 1974, 1980, and 1993. Respondent filed a Form 88 in April 1991 describing claimant as a handicapped employee and noting the various surgeries claimant had undergone in the past. Medical testimony from Dr. Timothy J. Birney indicated that claimant's past back problems had predisposed him to an aggravation of his back condition. Dr. Birney went on to state that "but for" claimant's preexisting handicapped condition, he would not have suffered the injuries encountered in 1994. Dr. C. Reiff Brown, an orthopedic surgeon, also examined claimant and went on to state that "but for" claimant's preexisting problems he would not have suffered the injuries encountered with respondent in 1994.

The Workers Compensation Fund argues that since claimant was a teacher, did not work in a physically active occupation, was returned to work without restrictions, and with no accommodation necessary, he could not be deemed a handicapped employee. The Fund appears to argue that because claimant was capable of returning to this one specific occupation, he would not in any way be a handicapped employee as is defined in K.S.A. 44-566. The Fund's argument is not well placed. Claimant's significant preexisting problems would clearly constitute a handicap in his ability to obtain or retain employment. The applicable law dealing with Fund liability is accurately set forth in the Award of the Administrative Law Judge and it is unnecessary for the Appeals Board to repeat same herein. It is sufficient to say, based upon claimant's testimony, prior medical history, the testimonies of Dr. Birney and Dr. Brown, and the employment records of the respondent, claimant was a handicapped employee as defined by K.S.A. 44-566. Respondent had knowledge of this preexisting handicap and "but for" claimant's preexisting condition, the injuries suffered on January 31, 1994, would not have occurred. Therefore, it is the finding of the Appeals Board that the Award granting 100 percent of the liability in this matter to the Kansas Workers Compensation Fund should be, and is hereby, affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated May 14, 1996, assessing 100 percent of the liability to the Kansas Workers Compensation Fund and granting respondent reimbursement from the Kansas Workers Compensation Fund for 100 percent of all compensation and benefits payable because of this injury, should be, and is hereby, affirmed in all respects.

The fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent to be paid directly as follows:

Ruth Herman	
Deposition of C. Reiff Brown, M.D.	\$ 88.00
Donalea Deines	
Deposition of Robb Ross	\$ 24.00
Deposition of Jo DeYoung	\$ 22.00
Avery/Woods Reporting Service, Inc.	
Deposition of Timothy J. Birney, M.D.	Unknown

IT IS SO ORDERED.

Dated this ____ day of November 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jerry M. Ward, Great Bend, KS
William W. Jeter, Hays, KS
Kenneth S. Johnson, Administrative Law Judge
Philip S. Harness, Director